(3)

Supreme Court, U.S.
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NO. 02-242

IN THE SUPREME COURT OF THE UNITED STATES

MANUEL DE LLANO, PETITIONER,

v.

DUANE BERGLUND, DAVID DANBOM, ALLAN G. FISCHER, MICHAEL GARRISON, RICK D. JOHNSON, ANDY KEOGH, JIM L. OZBUN, JIMMIE RICHARDSON, CHARLES A. SAWICKI, AND SHARON A. SIVERTS, RESPONDENTS

On Petition for a Writ of Certiorari To
The United States Circuit Court
for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

I. Introduction.

The question in this case is, "Can federal constitutional standards ever be met in an *ultra vires* proceeding?" Petition for Certiorari, at 1. NDSU Administrators never squarely answer the question, thereby implicitly conceding that an *ultra vires* proceeding does indeed violate federal constitutional standards.

Rather than answering the question posed, NDSU Administrators essentially argue: (1) Professor needed firing, it took us a lot of work, but we did it (Brief in Opposition, at 1-6, 12-15); (2) President Ozbun was not required to abide by the decision of the Special Review Committee (SRC) (*Ibid.*, at 15-20); and, (3) even if Ozbun was bound by the SRC's decision, there is no federal claim (*Ibid.*, at 6-11).

II. NDSU Administrators' Material Misstatement of the Record.

This petition hinges on whether actions taken after the SRC's decision were *ultra vires* and thus in violation of Professor's federally protected rights. On this important issue, NDSU Administrators misstate the record and falsely claim that Professor waived the issue. They contend:

> Since [Professor] did request a hearing before the SCFR, it is apparent that he acknowledged the non-binding nature of the SRC's recommendation and, thus, *waived any argument that the SRC's decision was final.*

Brief in Opposition, at 20, emphasis added.

Nothing could be further from the truth. Professor expressly reserved the issue when he requested the SCFR meeting:

> On August 27, 1994 I received a copy of the SCR Final Report ... .
>
> *As I have not heard from President Ozbun rescinding his "notice of Dismissal"* letter dated March 9, 1994, **I reluctantly ask you to convene the [SCFR]** to further consider my appeal dated 4/8/94.

Letter, Professor to Jay Leitch [Presiding officer of NDSU University Senate, and individual responsible for receiving SCFR meeting requests], September 9, 1994, emphasis added. Supplemental Appendix, SA2. As NDSU Administrators note, the SRC issued its decision on August 15, 1994. Brief in Opposition, at 3. Professor was faced with a 15-day deadline (measured from the date of receipt) to ask for a SCFR meeting. SBHE Policy Manual, §605(I)(7) (1994). Lodging, p. 6.

It is undisputed that Ozbun didn't tell Professor of Ozbun's decision to ignore the SRC until well after the 15-day deadline. Brief in Opposition, at 3, indicating that Ozbun "informed [Professor] that he was not adopting the SRC's recommendations" on September 22, 1994. Thus, unless Professor were to totally abandon the SCFR meeting, he had to trigger its beginning.

The situation is analogous to the practice, in some states, of a party preparing an adverse judgment in order to trigger the right to file an appeal. *See, e.g.*, Rule 58(a), 2nd ¶, NDRCivProc. Supplemental Appendix, at SA1. Serving notice of entry of

judgment is not construed as acquiescence in its tenor.

Further, in the footnote connected with that passage, NDSU Administrators claim:

> There is absolutely no reference in any NDSU policies stating that only an unfavorable decision SRC decision may be appealed by the faculty member. Instead, ... NDSU policies allowed de Llano to appeal to the SCFR ... irrespective of what was recommended by the SRC.

Brief in Opposition, at 20, n. 2. The reason for this supposed omission in the policy manual is plain – the Board had no need to state the obvious. A faculty member would have no reason to appeal a favorable decision of the SRC. Thus there was no reason to describe such a procedure.

III. This Court Needn't Decide Role of SRC.

NDSU Administrators contend that the SRC served only a mediation role. Brief in Opposition, at 15-20. In so arguing, NDSU Administrators misconstrue the role of this Court. "We ordinarily 'do not decide in the first instance issues not *decided* below.'" *Adarand Constructors, Inc. v. Mineta*, 534 U.S.103, ___, [slip opinion, at 5], (dismissing writ of certiorari as improvidently granted), emphasis added, citation omitted. As noted, neither the District Court nor the Court of Appeals decided this issue. Petition for Certiorari, at 10. Accordingly, this Court's role is appropriately limited to a remand to the lower court with directions to decide the issue and proceed accordingly.

IV. Ozbun Had no Authority to Ignore SRC.

Nonetheless, Professor believes it may be helpful to this Court to clarify the misunderstanding created by NDSU Administrators' analysis of the role of the SRC. Their analysis is based on Subsection A(3)(d) of the NDSU Faculty Manual. Brief in Opposition, at 16-17, citing Appendix pp. 225-226, 220-222, and 228-230.[1] NDSU Administrators do not address the language relied on by Professor – the part of the Manual setting out the steps to be followed when firing a tenured faculty member. Step 6 of the process allows the faculty member to ask for an SRC inquiry. SBHE Policy Manual, §605(I)(6). Lodging, at 6. The next step is: "If requested by the faculty member ... , formal hearing by the Standing Committee on Faculty Rights shall be provided under Section J." SBHE Policy Manual, §605(I)(7), emphasis added. Lodging, at 6.

NDSU Administrators' discussion of other parts of the manual is of no avail. This is a not particularly difficult issue of statutory construction. The plain meanings of the words are used. "[B]asic principles of statutory construction ... require giving effect to the meaning and placement of the words chosen by Congress." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 645 (1989). In plain words, for policy reasons not provided in the record, the State Board of Higher Education chose to omit any provision for anybody but the faculty member to appeal from the SRC's decision.

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[1] There are no such page numbers in the Appendix filed with this Court. Rather, the citations of NDSU Administrators are apparently to the Appendix filed with the Eighth Circuit Court of Appeals.

Further, as noted, the State Board apparently changed its mind about the role of the SRC. Petition for Certiorari, at 14-17. If the rules were meant to read as NDSU Administrators contend, "there would have been no need to amend the Manual in 1995 to explicitly give [Ozbun] the authority to decide 'upon reconsideration.' " *Ibid.*, at 16.

V. *Loudermill* is not *Carte Blanche* to Ignore Constitution.

NDSU Administrators misconstrue *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), as standing for the proposition that violation of state-created remedies can never be a violation of federally protected rights:

> Guided by this Court's decision in *Loudermill*, appellate court's [*sic*] have uniformly concluded that the alleged failure of a state agency to follow its internal regulations ... does not amount, in itself, to a violation of federal due process rights.

Brief in Opposition, at 9.

Loudermill does not stand for the proposition that failure to provide a state-created process cannot violate federal rights. Rather, as this Court has said, the process, regardless of its derivation, must provide the faculty member a "*meaningful* opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998), emphasis added (citing *Loudermill*). And that brings us to Professor's contention: **By implicit definition, action taken *ultra vires* CANNOT provide a meaningful opportunity to be heard.**

Because Ozbun had no authority to ignore the SRC, all

actions taken after that were *ultra vires* and so violated federal constitutional standards. Although NDSU Administrators regale us with page upon page of events they contend provided due process, they cannot escape the fact that the critical events (namely the SCFR "hearing," Ozbun's final dismissal letter, and the appeal to the State Board) all occurred *after* the SRC decision, and were thus *ultra vires.*

VI. Let the Well Be Not Poisoned.

NDSU Administrators' presentation seems more designed to poison the well than to address the question posed by Professor. For example, Ozbun's asserted reasons for firing Professor (Brief in Opposition, at 1-2) have nothing to do with whether actions taken after the SCR decision were *ultra vires.* Professor is confident this Court will not so easily be misled, and will keep its eyes on the ball of whether an *ultra vires* proceeding can ever meet federal constitutional standards.

VII. Summary and Conclusion.

Professor's petition is limited to the issue of whether federal constitutional standards can ever be met by state officials acting *ultra vires.* Professor respectfully submits the only appropriate answer is "No." Accordingly, Professor asks that this Court grant the petition for certiorari and ultimately remand the case to the Eighth Circuit Court of Appeals for remand to the United States District Court for the District of North Dakota for a determination of whether the proceedings against Professor should have stopped with the SRC decision. If that answer is "Yes," Professor should be allowed to go forward to a trial on the merits as to whether NDSU Administrators conspired with each other to violate his constitutional rights.

Respectfully submitted on October 4, 2002.

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SUPPLEMENTAL APPENDIX

Rule 58(a), North Dakota Rules of Civil Procedure

(a) **Entry of Judgment.** Upon the filing of an order for judgment, the prevailing party shall submit to the clerk an appropriate form of the judgment. The clerk shall sign and file the judgment and make an entry of it in the register of civil actions, at which time the judgment becomes effective.

If the prevailing party fails to submit to the clerk an appropriate form of the judgment within 30 days after the order for judgment is filed, any party may submit an appropriate form without prejudice to any rights that party may have to challenge it.

If the judgment directs the payment of money in a sum certain, or which by calculation can be made certain, the clerk shall also docket the judgment in the judgment docket as provided by law.

SA 2

Letter, Manuel de Llano to Dr. Jay Leitch,
Presiding Officer, University Senate
North Dakota State University
September 9, 1994
[Exh. MdL-58 to Docket Item 62 in District Court Record]

Fax for Professor Jay Leitch
237-7400 3 pages
September 9, 1994

Dr. Jay Leitch
Presiding Officer
University Senate
NDSU

Dear Dr. Leitch:

On August 27, 1994 I received a copy of the SRC Final Report dated August 15, 1994 and addressed to you by Professor Donald R. Kirby, chair of the SRC.

As I have not heard from President Ozbun rescinding his "Notice of Dismissal" letter dated March 9, 1994, I reluctantly ask you to convene the Senate Standing Committee on Faculty Rights to further consider my appeal dated 4/8/94.

Though I appreciate the SRC's "Conclusions and Recommendations" (page 6 of above mentioned letter) finding no cause for the president's dismissal of me, I regret that your office was unable to relay to the administration my appeal dated June 29, 1994 to its sense of fairness to designate to the SRC a faculty member from outside my college, for obvious "conflict of interest" on my dean's part. As a result of this bias, the cited letter

contains some criticism of me that I would like to respond to for the record.

If the SRC found me "unnecessarily combative" and using the grievance process with "unusual [ ] frequency", it is because I have been, and continue to be, harassed by the administration: unjustified increased teaching loads; denial of further salary raises, of routine travel allowances, of out-of-state-travel authorizations, of the "privilege" of hosting outside visitors, of usage of departmental AT&T phone access number for international calls and faxes; I've also been threatened with denial of developmental leave, even when academically justified, and am now threatened with dismissal from the university.

In summarizing my career at NDSU (page 1), Dr. Kirby's letter does not mention: a) that I was tenured at the National University of Mexico; b) that the alleged letter to remove me as chair of the physics department, allegedly signed by all department members (the majority of whom were then non-tenured) was never shown me in the original, rather only in crumpled, Xeroxed form - - - I doubt the authenticity of any such letter; c) that the dean's 1st reprimand letter (dated 12/3/92) was based on a non-existent student "petition for a change of instructors", as explained in my response letter dated 3/25/93; that the 2nd reprimand letter dated 12/10/93 was followed by an E-mail message of mine to the dean inviting him that we discuss our disagreements over lunch, an invitation that was ignored by the dean; d)

[p. 2 of original]
that one of the departmental "censures" against me was for freely communicating with my college colleagues via a Memo dated 1/27/94 on matters of college concern; e) that during my chairmanship of the department it was revitalized with numerous

new hires, and reformed in terms of quality teaching, increased faculty scholarship, graduate-degree conferrals and grantsmanship, and that undergraduate majors enrollments rose by 50% (although they have since fallen to roughly the same level as when I came to NDSU).

Also, Dr. Kirby's letter (bottom of page 5) omits clarifying that it was the current chair's decision, not mine, to unilaterally open a new PHYS 121 section that he personally wound up teaching. In other words, it was the current chair's own "requirement" to teach an extra, and in my view unneeded, section. Nor does the letter mention that the current chair's dealing "on an on-going basis with [my] disagreements", which took "large amounts of time that could be put to more productive ends", was because I have been trying very hard to prevent further decline of our department to a scenario consisting of: i) typical introductory physics courses offered by the department containing no modern (i.e., 20th Century) physics, as opposed to most other institutions (including the local high schools!); ii) undergrad physics majors enrollments dropping from 21 in 1990-91 to 15 last AY; iii) faculty involvement in active research/service falling from 100% in 1988-89 to 50% in AY 1992-93; iv) in Spring 1990, fully 45% of total "merit" salary increase money was allocated to the research/service-inactive half of the department faculty; v) over the past two academic years, departmental teaching loads have been *increased* for several research/service-active faculty, and *decreased* for the chair (who has not published a paper in more than 5 years); vi) "prohibition" by both chair and dean to bring in self-funded foreign visitors to do collaborative research with faculty and students here; vii) recommendation by chair, without previous faculty discussion, for "professor emeritus" status of an early-retiring faculty member whose research record over the past eleven years consisted of one publication; and viii) habitual denial

of routine support services to some faculty, for personal reasons.

The letter further left out (top of page 6) the fact that: a) the "shortcomings in the teaching of one class" that I was accused of in the dean's reprimand letter of 12/3/92 were fully addressed in my letter of response dated 2/25/93; b) the "ethical violations in the publishing of what is alleged to be substantially the same article in two journals" (top of page 6) were cleared up in my 2-hour-long interview with the SRC on 7/20/94 when I offered Dr. Kirby, who declined, copies of those two articles, and I showed the SRC that though most of the contents of one article served as an introduction to the second article (presented as a talk at a workshop), that more than half of latter consisted of totally new material; c) that rather than "refusal to cooperate with colleagues in Departmental committee work" I have volunteered for numerous committees even while being dropped, one by one, from previous committees by the current chair.

[p. 3 of original]
Sincerely,
/s/
Manuel de Llano
Professor of Physics

copy. NDSU President Jim Ozbun
Mr. Michael Geiermann, ND Higher Education Association